No. 6480

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

George G. Martinez,
Appellant,

vs.

John D. Nagle, Commissioner of Immigration, Port of San Francisco,
Appellee.

BRIEF FOR APPELLANT.

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GEORGE G. MARTINEZ, *Appellant*, vs. JOHN D. NAGLE, Commissioner of Immigration, Port of San Francisco, *Appellee*.	

BRIEF FOR APPELLANT.

STATEMENT OF CASE.

This appeal is taken from the order of the District Court for the Northern District of California denying a petition for a writ of habeas corpus.

The proceeding arose in the Court below by filing and presenting in behalf of the appellant a petition for a writ of habeas corpus praying for his discharge from the custody of John D. Nagle, as Commissioner of Immigration for the Port of San Francisco, the respondent in the Court below and the appellee herein.

FACTS OF THE CASE.

On August 10, 1929, George G. Martinez, a native and subject of Mexico, pleaded guilty in this Court

(No. 20,964-L) to two counts of an indictment, the first of which charged a violation of the Harrison Narcotic Act (26 U. S. C. A. 692, 705) and the second of which charged a violation of the Jones-Miller Act. (21 U. S. C. A. 174.) He received an aggregate sentence of one year and one day and a fine in the sum of one dollar. The records of this Court show that the fine was paid.

After the defendant had served approximately ten (10) months of his sentence, he was taken into custody by the immigration authorities for the purpose of deportation.

ARGUMENT.

Admittedly, the alien's conviction under the Harrison Narcotic Act does not furnish grounds for his deportation.

> *United States ex rel. Andreacchi v. Curran,* 38 Fed. (2d) 498.

However, the right to deport the alien is claimed under the Jones-Miller Act, which provides as follows:

> "Sec. 2. (c) That if any person fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or assists in so doing, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, such person shall upon conviction be fined not more than

> $5,000 and imprisoned for not more than ten years. (21 U. S. C. 174.)
>
> * * * * * * *
>
> (e) Any alien who at any time after his entry is convicted under subdivision (c) shall, upon the termination of the imprisonment imposed by the court upon such conviction and upon warrant issued by the Secretary of Labor, be taken into custody and deported in accordance with the provisions of sections 19 and 20 of the act of February 5, 1917, entitled 'An act to regulate the immigration of aliens to, and the residence of aliens in, the United States,' or provisions of law hereafter enacted which are amendatory of, or in substitution for, such sections. (21 U. S. C. 175.)"

We take it that it is admitted that, in order that deportation may follow, as a result of conviction of a violation of the Jones-Miller Act, supra, is necessary that a sentence of imprisonment be imposed and this must be so in view of the language of Sec. 2 (e), supra, as follows:

> "any alien who at any time after his entry is convicted * * * shall upon the termination of his *imprisonment* * * * be taken into custody and deported * * *."

In other words, if an alien, upon conviction of a violation of that act, should receive a sentence of a *fine* only, he could not be deported. The question, therefore, arises:

> "Did the alien receive a sentence of imprisonment as the result of his plea of guilty to a violation of the Jones-Miller Act?"

The sentence, which the alien received upon the two counts of the indictment, was in the aggregate and was as follows:

> "It is therefore ordered and adjudged that the said George G. Martinez of the indictment be imprisoned for the period of one year and one day in the United States penitentiary and pay a fine in the sum of One Dollar. Furthermore ordered that in default of the payment of the said fine that said defendant (George G. Martinez) be further imprisoned until said fine be paid or until he be otherwise discharged in due course of law."

It is our contention that it is impossible, in construing an aggregate sentence, which involves both imprisonment and fine, to apportion the *term of imprisonment* to any particular count of the indictment.

U. S. v. Peeke, 153 Fed. 166, C. C. A. 3rd.

And, an aggregate sentence of imprisonment upon two or more counts of an indictment does not run to *each of the counts severally.*

Brinkman v. Morgan, Warden, 253 Fed. 553, C. C. A. 8th.

However, in any event, if an aggregate sentence of imprisonment and fine is apportionable at all, we contend that a reasonable presumption of judicial regularity will assign the term of imprisonment to the first count of the indictment, namely, violation of the Harrison Narcotic Act, and the sentence of fine to the second count, namely, violation of the Jones-Miller Act. In *Ex parte Poole,* 273 Fed. 623, at page 624, Judge Bourquin, in construing an aggregate sentence, such as we have before us, said:

"Habeas corpus sought for that, upon petitioner's plea of guilty to an information charging three violations of the National Prohibition Act (Act of Congress October 28, 1919, c. 85, 41 Stat. 305) viz.: (1) Manufacturing intoxicating liquor without a permit; (2) failing to keep a permanent record of such liquor; and (3) possession of property designed to manufacture liquor intended for use in violation of said act—a single sentence and judgment were imposed that he be imprisoned 75 days and fined $150, which fine has been paid.

* * * Upon error, and in view of the record, a reasonable presumption of judicial regularity will assign the imprisonment to the first count of the information, and the fine to the second and third counts, and thus each offense is visited with the penalty the act authorizes. * * *."

CONCLUSION.

We respectfully submit that it being impossible to conclude from the sentence imposed that the alien was sentenced to imprisonment for a violation of the Jones-Miller Act, we submit that he is not deportable.

It is respectfully asked that the order of the Court below be reversed with directions to issue the writ of habeas corpus and discharge the applicant.

Dated, San Francisco,
September 26, 1931.

Respectfully submitted,

HENRY J. MEADOWS, JR.,
Attorney for Appellant.